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# The legal regulation of working time in domestic work

Deirdre McCann  
Jill Murray

CONDITIONS OF WORK AND EMPLOYMENT SERIES No. 27

TRAVAIL

Conditions of Work and Employment Programme

***The legal regulation of working time in domestic work***

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## Preface

The ILO is presently considering the adoption of a new international norm on decent work for domestic workers. In June 2010, the first discussion towards the adoption of a comprehensive standard (a Convention supplemented by a Recommendation) took place at the 99<sup>th</sup> session of the International Labour Conference. The second and final discussion is foreseen in June 2011.

Decent work for domestic workers means recognizing that they are real workers, that is, like other workers with labour rights. This entails acknowledging the proximity and personal relationship between domestic workers and their employer, while reaffirming the compatibility of domestic work with the employment relationship. The proposed new international standard on domestic work is aimed at providing minimum protection to a workforce that has long been excluded from labour and social protection but plays a valuable role in families and societies. Domestic workers provide essential housekeeping services and look after the children and elderly members of other people's households. However, they typically earn low wages and often work for long, unlimited hours, lack social security coverage, do not belong to a workers' organization or trade union, and are vulnerable to abuse and harassment. They are predominantly women who are migrants or belong to historically disadvantaged communities, which partly explain the persistent undervaluation of their work and their exclusion from legal entitlements that other workers enjoy.

Working time is one aspect of domestic work that has generally been excluded from national labour regulation, even in countries where domestic workers are covered by other legal entitlements. The result is that working hours of domestic workers around the world are among the longest, the most precarious and the most unpredictable. A recurrent argument is that the working time regulation which applies to all workers cannot be easily extended to domestic workers because of the very nature and specific circumstances of their work.

The present study examines the nature of working time in domestic work and the working time arrangements of different categories of domestic workers, while suggesting possible frameworks for the regulation of working time. The paper introduces a Model Law that could serve as a resource for the design of regulatory measures on working time in domestic work. The Model Law is grounded on the principle of "framed flexibility", which permits reconciling the flexibility needed in many domestic jobs, while simultaneously offering sufficient protection to domestic workers. It is hoped that this paper will provide insights to a topical debate on smart and meaningful regulations for decent working time for domestic workers.

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## 1. Introduction

Domestic work is the subject of a standard-setting process within the International Labour Organization (ILO) that is expected to generate international legal instruments in 2011. The ILO's initial report as part of this process sought "particular guidance on identifying, limiting and appropriately calculating working time" for domestic workers (ILO, 2009). The present study addresses this dimension of domestic work. Its goal is to examine and suggest potential frameworks for the regulation of working time. The study proposes regulatory techniques, which are outlined in a Model Law set out in the annex to the study. The study's "framed flexibility" approach to working time regulation is based on the needs and vulnerabilities of domestic workers and the particular nature of the demand for their labour by employers and clients. This model is based on a recognition that working time laws must address key areas in which decent work is likely to be threatened, as well as providing the necessary flexibility for domestic workers to provide a vital service to the family home.

The study grounds its proposals in the principles and traditions of international standard setting by the ILO. Many of the provisions of the Model Law reflect substantive working conditions norms applied by the Organization to workers in "standard" forms of employment. The study demonstrates, however, that these standards have progressively expanded in the scope of their application since the origins of the ILO in 1919. The Model Law embodies the notion that domestic workers should be explicitly recognized as an appropriate subject for labour regulation, in order to give effect to the ILO's guiding principle of decent work for all (ILO, 1999). Given the generally underdeveloped state of national legislation governing domestic workers, there is clearly a role for leadership by the ILO in establishing the minimum requirements to underpin dignity and social justice for this category of worker. This approach, however, requires a conceptual shift away from the long-standing assumption that regulation be directed at the "standard employment relationship" and towards the task of determining the regulatory techniques that can effectively apply to domestic work. To this end, the study suggests that the problem of how to regulate domestic workers' hours can usefully be situated within debates on the regulation of working time in contemporary working life. The study draws on the perspectives and preoccupations of the working time literature to analyse domestic work and the available approaches to its regulation.

The need to ensure regulatory effectiveness of international and domestic norms has also dictated the content of the Model Law, which recognizes the importance of providing information about legal standards, access to independent dispute resolution processes and techniques to alleviate disparities in bargaining power between individual domestic workers and their employers. Particular attention has been paid to the fact that many domestic workers are situated in less-developed countries, where the resources available for monitoring and effective implementation of labour standards is often lacking. Of central importance, however, have been the particular vulnerabilities of domestic workers, no matter where they are employed. The details provided in the Model Law are therefore necessary to sustain and encourage decent work, and the Model is expressed in everyday language and well-known concepts so that it can be understood in a wide range of settings. Further, a number of the devices contained in the Model Law are designed to promote collective labour relations in domestic work and are intended to act as a bolster to effective implementation in countries in which legal systems are under particular pressure. The experience of countries, such as South Africa and Uruguay which have adopted laws on domestic work, has been drawn on.

The study is structured as follows:

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■ Section 2: *Domestic work: Diversity and regulatory dimensions* outlines the nature of working time in domestic work and the elements of these working time arrangements that regulatory measures can be expected to address. It then considers the workers who engage in domestic work, highlighting their diversity, in particular with regard to the legal mode of their engagement, stage on the life-course and citizenship status.

■ Section 3: *A conceptual framework for regulation* sets out contemporary thinking on working time regulation as it is relevant to domestic work. It identifies a number of trends and issues that have influenced the detailed proposals contained in this study, namely the role of working time regulation in promoting work/family reconciliation, the recognition of the precarious nature of working time arrangements in domestic work and the notion of “working time flexibility”.

■ These principles are elaborated upon in Section 4: *Principles for the regulation of working time in domestic work*, which draws from the literature discussed in Section 3 to outline a set of principles in which to ground regulatory measures, and which underpin the Model Law. The following principles are considered in detail:

- legal recognition of the value of care-work;
- work/family reconciliation for domestic workers;
- universality of working time protection;
- unity of working time law;
- regulated flexibility and “working time capability”;
- the balance of regulatory techniques;
- the subject of regulation;
- innovative regulation;
- working time laws in their policy environments.

■ Section 5: *International standards: An evolution* outlines significant trends in ILO standard setting. It demonstrates that the coverage of sectors and occupations by the standards and their application to non-standard and precarious work have expanded over time. The study argues that ILO working time norms for domestic workers would reflect and entrench this productive expansion of the working time standards.

■ Section 6: *A “framed flexibility” model* introduces the Model Law that is proposed by the study as a resource for the design of regulatory measures on working time in domestic work. It is argued that a “framed flexibility” model can be adopted, which permits the kind of flexibility needed in many domestic jobs while simultaneously offering sufficient protection to domestic workers. The regulatory precedents of the Model Law are outlined, which include a range of ILO standards and laws on domestic work from South Africa and Uruguay. The Model Law has four essential features:

- First, it contains a number of key “framing standards”, which provide a framework within which working time flexibility is constrained by limiting working hours, mandating rest periods and designating certain periods as “unsocial”.
- Secondly, the study proposes a set of “flexibility” standards. These address the unpredictable requirements that can arise in certain domestic work occupations, by permitting periods of on-call work. These standards also respond to workers’ need to effectively combine paid labour with their family and community lives by allowing them to adjust their working hours and take emergency family leave.

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- Third, the study proposes “monitoring standards”, which are designed to regularize the documentation of domestic workers’ working time, and to integrate domestic work into national regulatory systems for the monitoring and enforcement of workplace laws.
  - Finally, across the Model Law are found a set of “incentives to bargain”, in the shape of provisions that offer additional flexibility, provided it is attained with the approval of a representative organization of domestic workers.



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## 2. Working time in domestic work: Regulatory dimensions

This section first identifies the working time arrangements that characterize domestic work. The objective is to highlight the problems that these arrangements can present for domestic workers, and which legal frameworks could therefore convincingly be designed to address. A broader analysis is then conducted of the nature of domestic work and the workers who engage in it, as relevant to the legal regulation of this form of work. This analysis highlights the diversity of domestic work and draws out certain of the key variables that influence this diversity.

### 2.1 Working time arrangements and contemporary regulation

The first step in identifying the regulatory dimensions of contemporary domestic work is to address the concerns about the working time arrangements that exist in this segment of the labour market. Drawing on the available (albeit rather limited) research on the nature of domestic work in contemporary economies highlighted in the ILO report (2009) on *Decent Work for Domestic Workers*, the following issues can be singled out as the key concerns:

- long or completely open-ended hours (daily, weekly, annual) and/or insufficient rest periods across the same timeframes;
- “unsociable”/undesirable/unsafe hours (for example, night work, work on weekends and public holidays), recognizing that young people and women are particularly vulnerable to requirements to travel home or return to work late at night;
- long spans of hours/split shifts (in which the domestic worker performs his or her daily hours in fragmented time periods);
- excessively short hours and the related low income;
- predictability of scheduling (daily, weekly, annual);
- limited access to the rewards of “life-course” working time (for example, discrimination against domestic workers in national retirement schemes; exclusion from paid annual leave schemes);
- limited access to sick leave;
- long or unpredictable periods of “on-call” or “standby” duty, and difficulties in determining how these periods should be measured;
- long- and/or short-term uncertainty about total hours, and hence income insecurity;
- lack of influence over working time arrangements, whether collective or individual;
- limited capacity to respond to family emergencies;
- lack of awareness of legal and collective rights on working time and the individual worker’s own contractual arrangements;
- inadequate documentation and verification of hours actually worked;
- lack of access to mechanisms for democratic participation in and control over workplace issues and to legally mandated consultation over working time at workplace, sector and national levels;

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- problems in implementation of legal measures.

Despite the range of dimensions of domestic work that could potentially be addressed by legal measures, presently many labour law regimes conceptualize domestic work as a unique work-form, inherently unsuited to regulation (ILO, 2009). This exclusionary model has a particular resonance in the area of working time since, even where domestic workers are covered by other labour law entitlements, they are explicitly excluded from working time laws. The outcome of the exclusionary model for the coverage of domestic workers is highlighted in the ILO report *Decent Work for Domestic Workers* (ILO, 2009). With respect to the central protection of weekly working hours limits, for example, the research conducted on the legal frameworks of 71 countries found around half impose no limit on the normal hours of domestic workers (ILO, 2009, p. 49). A review of other basic working time standards generated similar results (ibid, pp. 50-51).

## **2.2 Diversity of domestic work**

The terms “domestic work” and “domestic worker” embrace many different forms of labour, complicating the task of designing working time laws that meet the needs of all domestic workers and their employers. This endeavour requires awareness of the variables that shape the diversity of domestic work. To this end, this section outlines certain of the most significant of these variations, along the axes of the legal mode of the working relationship and the life-course and citizenship status of the worker.

### **2.2.1 Legal mode of engagement**

Domestic work may be undertaken in a number of different legal modes. Some domestic workers are direct employees of a private household; others are employed by governments or private agencies that provide home-care services (Cancedda, 2001). In some national settings, a contract of employment (whether formalized or not) will exist between the domestic worker and the person who engages his or her labour; yet this will not always be the case. For example, domestic workers who are relatives of the householder may fall outside of protective labour laws in countries in which a realm of “private relations” is excluded from legal regulation. It may be the case, for example, that the householder does not perceive herself or himself to be an employer at all, in the assumption, for example, that hiring domestic workers on an informal basis without a written contract of employment precludes a legally recognized employment relationship.

Some workers with multiple clients may not be classed as employees at all, and are therefore unlikely to be covered by labour law: for example, domestic workers may be in franchise arrangements with a company that specializes in a particular form of domestic service; or workers may be regarded as “independent contractors”, rather than employees, a class of workers generally excluded from the protection of national labour law regimes. Such exclusion is no guarantee that these workers are not vulnerable and therefore in need of the protection of labour law, however, particularly where the form of their legal engagement is effectively imposed on the relationship by the dominant party. Although the legal notion of independent contracting is often assumed to coincide with the generic category of “self-employment”, it often embraces workers who have varying degrees of dependency on their hirers (see Freedland, 2003; McCann, 2008).

Another mode of engagement is that of multiple contracts, under which the domestic worker has legal relations with multiple householders: for example, an individual might offer his or her services as a household cleaner to a number of different clients. The actual hours of work for each household may be very small: a person engaged to wash floors may spend less than one hour at each home. This mode of work raises the question of how to ascribe responsibility for the discharge of working time rights among a number of actors.

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Alternatively, a domestic worker may have a legal relationship with an employment agency that then contracts with householders for the provision of the worker's services. In some cases a contract of employment will be recognized between the worker and agency, and in others between the worker and householder, although strategies of ascription of the legal status of "employer" vary across national labour law regimes (see ILO, 2003).

### **2.2.2 Life-course and citizenship**

Domestic work also exhibits diversity, and raises a distinct set of regulatory challenges, when considered through the lens of the life-course and citizenship status of the worker. To conduct a life-course analysis, children and young adults who engage in domestic work are particularly vulnerable, and may need special protection with respect to their working time arrangements. During childbearing years, many domestic workers will have their own families to care for, or a wish to start a family, and working time arrangements may have to be adjusted to allow these workers sufficient time for caring obligations, including the care of elderly or ill relatives. Older workers whose entire professional lives have been spent undertaking domestic work may find themselves vulnerable to poverty and unemployment in old age. Occupational pension or superannuation schemes may exclude all domestic workers, exclude those who are not legally classified as employees, or fail to aggregate fragmented periods of domestic employment for the purposes of continuity of service. Indeed, all working time entitlements that are based on accumulated service risk disadvantaging many domestic workers: they are vulnerable to fragmented employment engagements (through the multiple client or temporary agency modes of work discussed in Section 2.2.1) or failure to record properly the duration of their working hours.

Domestic workers who are also transnational or internal migrants are also subject to greater risks of exploitation and abuse. Language barriers and the absence of a support network may heighten the domestic worker's reliance on the employing household, particularly where that household is also the migrant domestic worker's home in the host country. Moreover, the legal status of migrant domestic workers can be complicated by their modes of employment: for example, undocumented immigrants generally exist beyond any of the recognized and legally sanctioned employment modes. Even those migrant workers who are working legally in one of the recognized forms must also be understood to be enmeshed in another layer of legal regulation – migration law and policy – that may well be derived from more than one jurisdiction. Agencies that supply migrant labour may similarly operate across borders and exist in both legally recognized and other forms. The potentially complex legal identity of the migrant, then, and the particular risks these workers face in the host country, raise the stakes of legal regulation for such workers and call for particular attention in working time laws.





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### 3. A conceptual framework for regulation

A key objective of this study is to draw on the contemporary working time literature to understand working time arrangements in domestic work. This section highlights conceptual advances of this literature within which domestic workers' hours can be understood, examined and evaluated, and which can be used to generate ideas for the regulation of this work. In particular, the study centres on the strands of the literature that centre on the role of working time regulation as a conduit to work/family reconciliation, the working time dimensions of precariousness, and temporal flexibility.

#### 3.1 Work/family reconciliation as an objective of working time law

Work/family reconciliation has become an increasingly central objective of social policy across the globe and plays a pronounced role in the debates on legal interventions in working life (Conaghan and Rittich, 2007). This theme is prominent in the scholarly debates on the regulation of working time, an area in which the potential conflicts between work and family life is played out. Recent work has exposed the gendered complexion of conventional models of working time regulation, and significant research and policy efforts have been directed towards addressing the role of these frameworks in shaping family life and, in particular, on the repercussions of the male breadwinner/female caregiver model that they embody (Conaghan, 2000; Jacobs and Gerson, 2004; Fagan, 2004; Fudge, 2005; Murray, 2005b).

The insights of work/family analysis as it has been advanced by the scholarship on working time can be drawn on both to conceptualize the temporal dimensions of domestic work and to devise regulatory techniques that could be used to reshape working hours in this field.

At the conceptual level, work/family analysis reveals working hours in domestic work to be of the kind that are likely to inhibit the family life of the domestic worker. The long daily and weekly hours highlighted in Section 2.1 limit the capacity of domestic workers to sustain adequate family and private lives, whether to engage in family-building, undertake caring responsibilities or simply to preserve a dimension of their lives distinct from their engagement in waged labour. Across more extensive time-frames, migrant domestic workers are for substantial periods prevented from directing their caring labour towards their own families (ILO, 2009). The family lives of domestic workers are also threatened by the unpredictability of their hours; as in other occupations, where it is impossible for domestic workers to predict when they will be relieved of paid work, the quality of their "free time" is undermined (Clement et al., 2009).

At the policy level, the work/family analysis highlights both a central dilemma and a number of potential solutions. With respect to the former, in certain industrialized settings domestic work has been tied to the goal of work/family reconciliation.<sup>1</sup> In some of these contexts, state-based interventions on working time have been disregarded, neglected or are ineffectual (ILO, 2009). The growth in domestic work, then, can be linked to a failure on the part of policy actors to ensure, including through the legal regulation of working time, that parents have adequate time to devote to their family lives. Further, these policy frameworks neglect the private lives of domestic workers, which are entwined in and

<sup>1</sup> Although Windebank (2007) has questioned whether care policies based on the expansion of household services inevitably elicit positive work/family outcomes.

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frequently jeopardized by the outsourcing of carework as a solution to work/family dilemmas.

Work/family analyses of working time also highlight policy advances in the mainstream of working time law that can be integrated into regulatory models on domestic work. These efforts to shape working time regulation to work/family objectives have both co-opted conventional regulatory mechanisms (hours limits, minimum rest periods, unsocial hours designations) and prompted the design of innovative techniques, in the shape of a range of forms of family leave, emergency time-off rights, and entitlements for individual workers to influence the duration and scheduling of their working hours (Fagan, 2004; Lee et al., 2007; Murray, 2005b). The role that such initiatives can play in the regulation of domestic work is returned to in Section 4 below.

### **3.2 Precariousness and the standard model of working time**

Another strand of scholarship that illuminates the contours of domestic work is the burgeoning literature on precarious employment (see, for example, Vosko, 2006a; Kalleberg, 2009; Vosko et al., 2009). Much domestic service can be characterized as precarious in the sense that this concept has been elaborated in the literature as “work involving limited social benefits and statutory entitlements, job insecurity, low wages, and high risks of ill-health” (Vosko, 2006b, p. 4). Moreover, elaborations of the working time elements of precariousness centre on features that characterize domestic work: hours that are excessively short or long, irregular in number or timing or scheduled during unsocial periods (Campbell et al., 2009). Although Campbell et al. (2009) single out “working time insecurity” as a neglected facet of precariousness, this notion is particularly illuminating for the analysis of domestic work, tying it to the broader expansion of precarious forms of work while generating concepts and techniques for regulation.

As part of such an analysis it is useful to isolate, as a driver of precariousness, domestic work’s divergence from the “Standard Employment Relationship” (SER) (Muckenberger, 1989; Bosch, 2004; Vosko, 2006a). Domestic work deviates from the SER along multiple axes, most obviously its location, but also its working time configurations, in the often striking contrast between the actual working hours of domestic workers and the traditional 9-5/Monday-Friday workweek embodied in the standard model. The complex intersections of precariousness and “non-standard” configurations have a particular resonance in the field of regulation, given the strong affinities of conventional labour law frameworks with the standard model (McCann, 2008). The extent to which domestic work deviates from the SER has shaped its legal treatment, often being considered so profound as to render domestic work resistant to regulation. In other contexts, this deviation has had a particularly intense dynamic in placing domestic workers beyond the reach of working time laws, which, as mentioned in Section 2.1, are frequently restricted in their coverage of domestic work even where other standards are applicable. Simultaneously, however, the working time dimension of the SER holds promise for the regulation of domestic work, a point returned to in Section 4 below.

### **3.3 Working time flexibility**

An analysis attentive to notions of “working time flexibility” is also useful in conceptualizing the working time of domestic workers. While a contested concept, in the working time arena flexibility mechanisms are understood to facilitate working hours that deviate from the working time component of the SER, whether at the behest of worker or employer (Collins, 2005; Fudge, 2005). This concept is both descriptive and normative and has implications for working time policy on domestic work in both forms. It can be drawn

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on, first, to reshape the understanding of domestic work as inevitably involving long hours, by showing that the expectation that a domestic worker will be extensively and unpredictably available is an unconstrained form of flexibility. A working time flexibility analysis, then, reveals domestic work as a sector characterized by working time arrangements that, rather than inevitable or “natural” adjuncts of the job, reflect an exceptionally high degree of employer-oriented flexibility.

Situating domestic work on a continuum of working time flexibility has implications for the design of regulatory models. It allows domestic work to be grouped with a range of comparable occupations and thereby to reconsider the assumption that it is peculiarly resistant to being subject to a suitable legal regime. In particular, it suggests recourse to models that have been designed either to couple flexibility in the interests of employers with protections for workers, or to integrate a degree of employee-oriented flexibility into regulatory models (see further Section 4).



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## 4. Principles for the regulation of working time in domestic work

Drawing on the insights that were garnered in Section 3 from examining certain of the preoccupations of the contemporary working time debates, this section outlines key principles in which to ground the regulation of working time in domestic work. These principles are broad in scope and can be drawn on to shape legal regimes across a range of regulatory settings. They are deployed in this study to underpin the Model Law outlined in Section 6.

**Legal recognition of the value of care-work.** The starting point for the regulation of working time in domestic work is the recognition – in legal form – of the value of this form of labour. The need for domestic work to be recognized as valuable is an overarching insight applicable to all relevant legal frameworks (ILO, 2009).

It has, however, particular implications for measures on working time. This principle suggests, most notably, a “formalization” or “standardization” of domestic labour. In the most fundamental sense, this formalization implies that domestic work should be subject to regulation rather than assigned to a realm beyond the reach of formal norms (ILO, 2009). A less obvious aspect of formalization is that domestic work should be recognized as comparable in a range of dimensions to other of the caring professions. This insight highlights the value of domestic labour by emphasizing its role in the care economy. It can be brought to bear on the quest for regulatory models, in that similar occupations regulated to address the dimensions of temporal flexibility encountered in domestic work: the need for emergency care and the impossibility of uniform adherence to working hours schedules. In particular, the medical, nursing and residential care professions are governed by regulatory frameworks that take into account the need for such temporal flexibilities and can be drawn on to inspire new models for the household services sector.

**Work/family reconciliation for domestic workers.** The work/family approach outlined in Section 3.1 implies a central role for legal intervention in working hours: to ensure that the private and family lives of domestic workers are not undermined in the drive to sustain the family life of the dominant party to the wage-work bargain. At least in part, the role of working time regulations should be to ensure that the work/life balance of the subordinate party is also preserved. This objective suggests that, for reasons that are both longstanding (health and safety, productivity) and of more recent provenance (work/family, work/life), limits on hours and rest periods should be extended to domestic workers.

The project of extending working time regulation to domestic work engages the critical issue of the relationship between the paid work of domestic workers and the “ordinary” functions normally carried out by family members (generally women, given the gendered nature of unpaid domestic work in most societies). Indeed, the failure to properly distinguish between parental care work and paid care work compounds the undervaluation of domestic work in the paid employment sphere and threatens to obscure elements of the working lives of domestic workers that should be subject to regulatory intervention.

To this end, it is important to re-conceptualize the nature of domestic care work so that it is not conflated in any simple way with the caring functions of, for example, parents. The underlying economic transaction through which a particular form of labour is purchased for particular ends is at the heart of the distinction that must be made between, for example, a parent changing their own child’s nappy and a domestic worker performing the same task. A parent will normally undertake her domestic tasks having regard to an internal set of values, expectations and emotional relationships within her family group and beyond. The domestic worker must learn and then comply with this unspoken framework

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of action in order to perform her duties in accordance with the householder's wishes. Her work involves occupational knowledge and skill. Unlike the parent who deviates from her intended care plans, a misstep by the domestic worker in reading the householder's values and expectations might lead to termination of the employment relationship. One domestic worker crystallized her experience of the complex task of managing the labour process in which she was engaged in the following terms:

*[I had] the right to say "yes" all the time, the right to be cheerful always [but] no right ... to be sad or have a long face [or] be tired (Filipina domestic worker in Belgium, quoted in ETUC, 2005, p. 33).*

A proper conceptualization of domestic work is particularly vital to understanding working time and the nature of its regulation. The fact that all new parents feel exhausted at some stage of caring for their babies, for example, does not in any way alter the need for regulation to prevent the exhaustion of domestic workers who also undertake this task. Again, the parental experience cannot and should not be simply mapped onto that of the domestic worker. Seeing the domestic workers' tasks as a form of labour in this way allows us to consider the regulation of domestic work in terms of the regulation of comparable forms of work. It also suggests that newer techniques of work/family regulation are integrated into laws on domestic work (see further Section 6.2 below).

**Universality.** The principle of universality is grounded in the assumption that all workers are equally entitled to working time protections. It can therefore be tied to the human rights perspective that has recently enriched labour law scholarship (e.g. Alston, 2005; Fenwick and Novitz, forthcoming). As part of this evolving literature, the human rights tradition has been called on to evaluate legal measures on domestic work (Mantouvalu, 2006). In the field of working time, it has been recalled that working time measures embody rights that feature in the foundational human rights texts and should therefore be universal in reach (ILO, 2005; McCann, forthcoming; Murray, forthcoming).

The principle of universality most obviously precludes the exclusionary model that presently dominates national-level labour law regimes in their treatment of domestic work. It also has implications for other of the "non-standard" working arrangements, in that it implies that dependent workers should be entitled to protection irrespective of their contractual arrangements. This observation is of particular importance in its application to workers supplied to private households by third parties, who constitute a substantial segment of the sector in many countries (Cancedda, 2001), and can be advanced through the recognition of temporary agency staff as protected workers in measures specifically tailored to the tripartite nature of their working relationships.<sup>2</sup> Casual workers and those in semi-dependent working relationships would also require specific recognition. Further, since domestic work is fuelled by the mobility of workers in temporary and permanent migration, both internal and international, the universality principle also urges focused attention to the needs of migrant workers. To this end, again recourse to regulatory models from related occupations can suggest techniques of legal reform.

**The unity of working time law.** It is evident that domestic work, including in its working time dimensions, must be embraced by labour law regimes. Such regulatory reform, however, must be embarked on in an awareness of the significance of domestic work for the evolution of working time laws and, in particular, with a concern that legal measures on domestic work do not undermine the standard of protection available under mainstream working time laws. This is a question, then, of the coherence of regulatory regimes on working time, and implies that models of working time regulation are most convincingly conceptualized as an integrated whole.

<sup>2</sup> On the regulation of temporary agency work, see Vosko, 2000; McCann, 2008.

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**Regulated flexibility and “working time capability”.** The working hours that characterize domestic work in part fuel its displacement from labour law regimes by diverging from the standard model of working time. For this reason, domestic workers do not benefit from the protections afforded by working time law regimes. In response, the principal benefits of the standard model (certainty, regularity, the preservation of social and community time) must be retained in the working time models devised for domestic work. The project of regulating this sector, then, will inevitably entail a degree of “standardization” of working hours, to align them with traditional frameworks of working time protection and thereby derive the benefits offered by this model (Bosch, 2006). This “standardization” is centred on both the duration and predictability dimensions of its working time arrangements, and requires curbing long and unsocial hours and ensuring certainty for domestic workers in the scheduling of their working hours.

Certain forms of domestic work, however, and in particular those that involve elements of personal care, must inevitably escape the strictures of standardized working time, at least periodically. The challenge for the regulation of domestic work is to ensure compatible flexibilities: the employer’s need for the presence of the domestic worker in urgent circumstances and the worker’s ability to address unexpected elements of his or her family life and other responsibilities. A solution can be found by drawing on Bosch’s (2004) “flexible SER” approach, in his call to make the standard-form flexible where necessary while retaining its protective elements. This approach is also supported by the notion of “working time capabilities” as it has been developed in the arena of working time to suggest policies to support the capacity of individual workers to influence their working hours (Lee and McCann, 2008). This divergence, or “flexibility”, is foreseen in regulatory models in a range of caring professions and is reflected in the “framed flexibility” model for domestic work outlined in the following section.

**The balance of regulatory techniques.** The regulation of working time is subsumed within broader debates on forms most suited to contemporary labour markets (see, for example, Davidov and Langille, 2006; Arup et al., 2005; Lee and McCann, forthcoming). An aspect of this work of particular relevance to this study is the suggested need for a careful balancing of regulatory techniques, in the shape of labour law’s core regulatory instruments of legislated and collectively bargained norms (McCann, 2004; Lee and McCann, 2006).

These insights can be applied to the regulation of working time in the domestic services sector by singling out for investigation the role of statutory regulation. Here, the occupational context, including the isolation of domestic workers inside the private home of their employer, is one in which collective bargaining is strikingly ill-developed. Given the limited capacity of the collective partners to negotiate effective norms in this domain, then, the role of statutory standards inevitably becomes more pronounced. This assertion is in part grounded in the available evidence that statutory regulation has broad-based effects on working hours, while collective regulation does not operate in a comparable manner beyond the highly regulated contexts of northern Europe (Lee, 2004; Lee et al., 2007; for evidence of the impact of minimum wage legislation on domestic work, see Hertz, 2004).

As a consequence, it can be suggested that the ILO standards on domestic work should place a particular emphasis on the role of legislative measures. In national settings, the evermore urgent need to advance labour standards in developing countries and the growth of precarious employment across the industrialized world suggest an upwards trajectory across regulatory levels in the articulation of norms. This dynamic would contrast with the continental European trend in recent decades of devolution towards the sectoral, industry and enterprise levels, with the goal of permitting the collective partners to enunciate the details of regulatory design (see Marginson and Sissons, 2001). The proposed Model Law outlined in Section 6 is designed to generate legislation more detailed than the “framework norms” characteristic of highly-regulated regimes that can

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rely on collectively bargained norms to protect the vast majority of their labour forces (i.e. Denmark, Germany and the Netherlands; see Anxo and O'Reilly, 2000; Lee, 2004). This approach recognizes that demands for a retreat from “prescriptive” standards common in neo-liberal accounts of labour market regulation are inappropriate in the case of vulnerable, dispersed and potentially isolated domestic workers (e.g. World Bank, 2007, 2009). With respect to domestic work, the implausibility of collectively bargained norms having the capacity substantially to regulate the sector, even in the most highly regulated regimes of northern Europe, strongly confirms the need for detailed legislation and is reflected in the regulatory model outlined in Section 6.

Regulatory frameworks on domestic work can also be deployed, however, to promote the development of collective bargaining (ILO, 2009). This strategy is particularly appropriate in the field of working time, where statutory norms are most effective in the context of collectively regulated regimes, and the kinds of individualization that can support work/family reconciliation are most effectively articulated through the highly responsive form of collective regulation (Lee and McCann, 2006; on the notion of “protective individualization” see McCann, 2004). Standardized working time patterns in themselves can help to sustain collective organization by limiting working hours and preserving “collective time” (Supiot, 1999). Yet a more proactive role for statute would be to build the mechanisms for collective voice. This could conceivably be achieved, for example, by embedding in legislative instruments incentives to build collective bargaining structures, or by providing for extension mechanisms, and could be advanced as part of a process of regulatory experimentation of the kind outlined below under **Innovative regulation**.

**The subject of regulation.** Legal standards, especially those elaborated at the international level, are expected to embrace a substantial cohort of workers whose bargaining power is limited. This observation is substantiated by the historical preoccupations of the standard-setting process, in which, as the constituency of ILO member States expanded, the application of the international norms to countries at all levels of development was assumed (e.g. ILO, 1967). This understanding of the expansive scope of the international labour code has since been reinforced in more recent efforts to establish standards for certain of the precarious forms of work that are present in both industrialized and developing settings (see Vosko, 2006c; Section 5.2 below).<sup>3</sup>

The ILO's efforts in this area suggest that the nature of the “legal subject” has become a more compelling question in recent decades than during the reign of the SER, even for generally applicable legal norms. De-standardization and diversification demand a more precise delineation of the statutory image of the protected worker. In conjunction with the observations made above on the centrality of statutory norms and need for enhanced detail in legal texts, it can also be suggested that regulatory frameworks on working time in domestic work should be designed in line with a clearly delineated model of the workers they are intended to protect. Moreover, these legal subjects should be the most vulnerable workers: those with the lowest levels of bargaining power who are likely to be subject to the most intense pressure to undertake long, unhealthy or family-jeopardizing working hours.<sup>4</sup>

<sup>3</sup> Part-time work: Part-Time Work Convention, 1994 (No. 175); temporary agency work: Private Employment Agencies Convention, 1997 (No. 181); home work: Home Work Convention, 1996 (No. 177); semi-dependent, disguised and triangular employment relationships: Employment Relationship Recommendation, 2006 (No. 198).

<sup>4</sup> This approach builds on the objectives of the Employment Relationship Recommendation, 2006 (No. 198).



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**Innovative regulation: Dynamic and responsive regimes.** The debates on labour market regulation are animated by concerns about a potential gap between labour law “on the statute book” and its actual influence on real-world behaviour. These fears have been spurred by the disintegration of the standard model in advanced industrialized countries, and also by a renewed aspiration to protect workers in developing countries that is linked to their firmer integration into global value chains and to broader efforts to understand the operation of formal regulatory institutions in contexts of high unemployment, underemployment and informal employment (Conaghan et al., 2004; Davidov and Langille, 2006; Fenwick et al., 2007). The responses to these challenges are only beginning to be mapped (Fenwick et al., 2007; Lee and McCann, forthcoming), thus rendering the design of legal frameworks on domestic work, although vital, necessarily complex and uncertain. As a consequence, a degree of experimentation is inevitable in designing legal frameworks on domestic work, including on working hours (ILO, 2009).

This complexity suggests that the regulatory outcomes for domestic workers should be dynamic and open to the processes of empirical testing and incremental reform. Some models show that statutory standards may be periodically evaluated and tailored reforms introduced (for initial reflections on this process, see Frey, forthcoming).<sup>5</sup> Policy actors may wish to encourage the systematic study and investigation of processes of implementation of any laws governing domestic workers with the objective of determining regulatory good practice in a systematic manner. Such approaches would be in line with recent insights from the legal literature on the effectiveness of regulatory models in developing countries, which suggest experimentation coupled with empirical-evaluation as a response to regulatory uncertainties (Fenwick et al., 2007; Lee and McCann, forthcoming). This literature suggests a distinction between the content of the substantive standards and their implementation, with the processes of experimentation being centred primarily on the latter.

**Working time laws in their policy environments.** Finally, it is suggested that regulatory models on working time should be developed in a manner attentive to the range of policy contexts that shape and support them. These policy frameworks include, most obviously, those on domestic work and social development, but may also include national policies on treatment of immigrants, state funding for child care and aged care, and so on. Although it is not addressed in detail in this report, it is in line with the unity principle outlined above that working time policies in the field of domestic work should be designed to complement general national regulatory measures on working time (Anxo et al., 2004). This insight also applies to related policy arenas, to capture in particular the relationship between low wages and long hours and between work/family policies and the demand for domestic work (Cancedda, 2001).

<sup>5</sup> Similar models have been adopted in a number of industrialized countries, including under the UK National Minimum Wage legislation (e.g. Low Pay Commission, 2010).



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## 5. International standards: An evolution

This section examines the historical evolution of the ILO's working time instruments and of the broader corpus of international labour standards. The aim is to consider the implications of these standards for the regulation of working time in domestic work and reflect on the role international standards on domestic work might play as part of this trajectory. A number of patterns emerge from this consideration: in summary, that the ILO has gradually extended coverage of its standards with respect to their sectoral and occupational scope and application to non-standard and precarious work. It is argued that these regulatory trends suggest that the international regulation of working hours in domestic work is a viable next stage in this evolution, and that existing international standards harbour techniques that can usefully be put to this end.

### 5.1 Sectoral and occupational scope

The trajectory of ILO regulation has, in part, been one of expansion of the sectors and occupations captured within this regulatory sphere. Such an expansive approach was not evident in the early treatment of working time. The first working time instrument, the Hours of Work (Industry) Convention, 1919 (No. 1), was confined to industrial labour. This sectoral restriction was overcome in the Hours of Work (Commerce and Offices) Convention, 1930 (No. 30), which applies to commercial and trading establishments and to office work.<sup>6</sup> This extension of the international working time norms, however, stopped abruptly at certain service sector employers. Convention No. 30 explicitly excludes a number of establishments, including “establishments for the treatment or care of the sick, infirm, destitute, or mentally unfit”,<sup>7</sup> hotels and restaurants,<sup>8</sup> and theatres.<sup>9</sup> A set of non-binding Recommendations was adopted in the same year to cover these excluded fields,<sup>10</sup> in which these instruments did not contain specific standards but instead called for “special investigation” of the legal treatment of the excluded establishments in light of the standards contained in Convention No. 30.<sup>11</sup> They therefore illustrate the prevailing perception at the time that regulation is needed for occupations that do not readily fit within the factory model, yet also highlight the lack of consensus on the appropriate forms of such regulation.

Gradually, however, the ILO extended the scope of its binding working time norms. In part, this expansion was achieved through the enactment of working time instruments of universal – rather than sectorally specific – scope, as part of the broader trend towards the expanded personal scope of ILO standards. Thus the Holidays with Pay Convention (Revised), 1970 (No. 132), and Night Work Convention, 1990 (No. 171), apply to “all

<sup>6</sup> Prior to Convention No. 30, the ILO had already enriched the coverage of working time standards by adopting the Night Work (Bakeries) Convention, 1925 (No. 20).

<sup>7</sup> Convention No. 30, Article 2(a).

<sup>8</sup> *ibid.*, Article 2(b).

<sup>9</sup> *ibid.*, Article 2(c).

<sup>10</sup> Hours of Work (Hotels, etc.) Recommendation, 1930 (No. 37); Hours of Work (Theatres, etc.) Recommendation, 1930 (No. 38); Hours of Work (Hospitals, etc.) Recommendation, 1930 (No. 39).

<sup>11</sup> Recommendation No. 37, Paragraph 1; Recommendation No. 38, Paragraph 1; Recommendation No. 39, Paragraph 1.

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employed persons”.<sup>12</sup> The rules on daily and weekly hours limits were also eventually extended to cover the fields explicitly excluded by Conventions Nos. 1 and 30 and other occupations that were not captured by these standards. Specific Conventions were adopted, for example, on working time in road transport,<sup>13</sup> nursing,<sup>14</sup> and hotels and restaurants.<sup>15</sup>

The historical expansion of the ILO standards on working time to sectors and occupations beyond the industrial sphere represents a trajectory of gradual expansion and refining of these standards to protect a broader range of workers and to meet the divergent needs of employers. This trajectory, moreover, suggests that specific working time standards on domestic work at the international level are a convincing next step, in that they would extend to one of the few occupations that remain beyond the reach of international working time law.

## 5.2 Non-standard and precarious work

Paralleling the expansion in the sectoral and occupational scope of the international standards has been an extension in the coverage of non-standard and precarious working arrangements. This trend has embraced forms of work that, like domestic work, diverge from the standard model along at least three main axes: location of work, legal mode of engagement and working time arrangements.

With respect to the dimension of location, by definition domestic work is carried out in the employer’s home. It was never invisible to ILO regulation (for more detail see ILO, 2009). A number of the early Conventions identified domestic work as a permissible exclusion from their protections.<sup>16</sup> However, the most persistent element of this strategy of exclusion has not derived from a regulatory concern about the work of domestic servants at all, but rather from a different set of problems associated with workplaces in which only the employer’s family members are employed. In fact, the exclusion of “family workers” did not necessarily exclude most domestic workers. Under the Minimum Age (Non-Industrial Employment) Convention, 1932 (No. 33), for example, States may exclude domestic work, but only where it is performed by the employer’s family members.<sup>17</sup> This narrow concern with family workers seems to be derived from the nature of the legal relations between the parties and, in particular, the legal status of the employer/head of family. Reluctance to regulate this mode of work should not, then, be conflated with a reluctance to intervene in the private home to secure appropriate standards for domestic workers. Other early Conventions were explicitly designed to cover domestic work: in particular, the Conventions that dealt with social security-related matters, such as the

<sup>12</sup> Convention No. 132, Article 2; Convention No. 171, Article 2(1). The weekly rest standards remain sectorally specific. The Part-Time Work Convention, 1994 (No. 175), applies to “all part-time workers” (Article 3).

<sup>13</sup> Hours of Work and Rest Periods (Road Transport) Convention, 1939 (No. 67); Hours of Work and Rest Periods (Road Transport) Convention, 1979 (No. 153).

<sup>14</sup> Nursing Personnel Convention, 1977 (No. 149).

<sup>15</sup> Working Conditions (Hotels and Restaurants) Convention, 1991 (No. 172).

<sup>16</sup> e.g. Unemployment Provision Convention, 1934 (No. 44), Article 2(1).

<sup>17</sup> Convention No. 33, Article 1(3).

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Sickness Insurance (Industry) Convention, 1927 (No. 24),<sup>18</sup> have tended to be universal in scope and even explicitly to cover domestic work.

It is perhaps tempting to assume that the private realm of the home would always have been considered an inappropriate sphere for international labour regulation on working time in particular; and, indeed, the focus of the earliest ILO standard on manual work in industry could be interpreted to reflect such a belief. More generally, the gendered nature of the early Conventions tends to suggest that the female realm of indoor domestic service provision was to be addressed separately from the sphere of the standard male breadwinner. However, any crude public/private distinction does not do justice to the richness of the ILO's approach to standard setting during this era (Murray, 2001): for example, the private realm of caring was not totally excised from the public sphere of paid labour, as evidenced by the Maternity Protection (Industry) Convention, 1919 (No. 3), which created a regime of breast-feeding breaks for working mothers.<sup>19</sup>

In any event, by the last decades of the twentieth century, traditional visions of “the worker” and “the workplace” were subject to a dynamic revision within the ILO system that embraced an extension of the international labour standards more fully to capture work in the private home. Over time, the ILO abandoned the methodology of permitting specific exclusions, including for domestic work, in favour of a more general evidence-based approach towards exceptions from its standards (for example, by permitting member States to exclude only those groups of workers to whom the application of a standard “would raise special problems of a substantial nature”).<sup>20</sup> Indeed, generally, as mentioned in Section 5.1, the post-1970 standards are marked by a universalist positive scope and therefore extend to domestic workers, unless specific exclusion at the national level is permitted. The Organization has also devised international standards specifically to apply in the private household. The Home Work Convention, 1996 (No. 177), and Home Work Recommendation, 1996 (No. 184), place work in the private home at the centre of regulatory concern by addressing work carried out in this setting that generates a product or service for the employer.<sup>21</sup>

Secondly, as discussed in Section 2.2.1 above, domestic labour can be supplied through a range of legal modes, including direct employment, multiple contracting, independent contracting and triangular relationships. ILO practice in identifying the mode of legal engagement of the regulatory subject varies quite substantially.<sup>22</sup> Although it is not necessary for the purposes of this study to pursue in detail, it is worth noting that the ILO's shift towards an expanded coverage has demonstrated a concern to embrace a broader range of modes of contracting labour, including certain of the relationships found in domestic work. The Maternity Protection Convention, 2000 (No. 183), for example, extends to “all employed women, including those in atypical forms of dependent work”.<sup>23</sup>

<sup>18</sup> Convention No. 24, Article 2. See also the Old-Age Insurance (Agriculture) Convention, 1933 (No. 36), Article 2(1).

<sup>19</sup> Convention No. 3, Article 3(d).

<sup>20</sup> e.g. Night Work Convention, 1990 (No. 171), Article 2(1).

<sup>21</sup> Convention No. 177, Article 1(a).

<sup>22</sup> For example, in the distinction between standards that refer to “workers” [e.g. Workers with Family Responsibilities Convention, 1981 (No. 156)] or “all employed persons” [e.g. Night Work Convention, 1990 (No. 171)].

<sup>23</sup> Convention NO. 183, Article 2(1).

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Moreover, in the Employment Relationship Recommendation, 2006 (No. 198), the Organization recognized the potential risks of manipulation of employment status and the need to protect the most vulnerable workers, while the Private Employment Agencies Convention, 1997 (No. 181), sets standards for companies that broker the labour of workers (whether as employer or agent).

Finally, with respect to the standards' coverage of working time arrangements, the primary and archetypal subject of Convention No. 1 was the male breadwinner employed full time over the life-course in industrial manual work (Murray, 2001). It would be inaccurate, however, to view the early working time Conventions simply as regulating standard working time arrangements. On the contrary, Convention No. 1 set an important benchmark by identifying a variety of arrangements that even today tend to be characterized as "non-standard" (Murray, 2001). In particular, the Convention sets norms for shift workers,<sup>24</sup> including those involved in continuous 24-hour shift cycles.<sup>25</sup> It also recognizes workers whose duties are scheduled around the periphery of the standard day ("preparatory or complementary work") or whose engagement is sporadic ("essentially intermittent"), in each case by permitting the exclusion of these workers at the national level.<sup>26</sup> These exclusions, however, are far from absolute. States can only exclude these categories of workers after consulting with organizations of employers and of the workers concerned; normal hours limits must be mandated for the excluded workers; and these workers are entitled to the same overtime payments as the general labour force.<sup>27</sup> In other words, the realm of non-standard work was recognized in 1919 through a mechanism of devolution from the international level to the ratifying State, and therefore compliance with the ILO's first working time Convention means that abstaining from the regulation of non-standard work is not an option. Similar strategies were adopted in subsequent working hours standards.<sup>28</sup> Moreover, the night work standards<sup>29</sup> have always mandated standards for workers frequently perceived to exist in the shadow of the standard worker and his normative working time patterns, as, more recently, have the Part-Time Work Convention, 1994 (No. 175), and Recommendation (No. 182).

The sectorally and occupationally specific instruments on working time that were adopted after Convention No. 30 (see Section 5.1 above) are particularly relevant to the design of legal measures on domestic work. These standards address the regulatory needs of employers and workers in sectors in which the working time challenges are not entirely dissimilar to those of domestic workers: extensive and unpredictable demands, for example; the need for work beyond standard hours; and the use of on-call work. Of most relevance to this study, given the particular focus on care work in the ILO standard-setting project on domestic work, are the standards on the nursing profession: the Nursing Personnel Convention, 1977 (No. 149), and its accompanying Recommendation No. 157.

<sup>24</sup> Convention No. 1, Article 2(c). It is permissible to employ shift workers in excess of the eight-hour daily and 48-hour weekly limits, provided their average hours over a period of up to three weeks do not exceed these limits.

<sup>25</sup> These workers are subject to a limit on normal working time of 56 hours per week on average (Convention No. 1, Article 4).

<sup>26</sup> Convention No. 1, Article 6.

<sup>27</sup> Convention No. 1, Article 6(2).

<sup>28</sup> Convention No. 30, Article 7; Recommendation No. 116, Paragraph 14(e)(i) (intermittent work).

<sup>29</sup> The first Convention on night work was the Night Work (Women) Convention, 1919 (No. 4), and the most recent is the Night Work Convention, 1991 (No. 171).

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Certain dimensions of the nursing standards are particularly significant for present purposes. First, it should be noted that Convention No. 149 already regulates domestic work, where it involves nursing care and nursing services.<sup>30</sup> Secondly, the working time elements of the Convention are grounded in the principle of universality outlined in Section 4, in that it calls for the extension to this group of care workers of conditions at least equivalent to other workers in relation to working hours.<sup>31</sup> Thirdly, the nursing standards embody legal techniques that can be drawn on to design regulatory measures at the international and national levels. This observation in part underpins the design of the “framed flexibility” model that is set out in the following section.

<sup>30</sup> Convention No. 149 applies to “all nursing personnel, wherever they work” [Article 1(2)].

<sup>31</sup> Convention No. 149, Article 6.





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## 6. A “framed flexibility” model

In an attempt to design a legal framework that embodies the principles outlined in the previous section, a Model Law is set out in the Annex of this study. This framework draws on a range of legal instruments. Most notably, it reflects the standards embodied in the ILO instruments on working time:

- *hours of work standards*: Hours of Work (Industry) Convention, 1919 (No. 1); Hours of Work (Commerce and Offices) Convention, 1930 (No. 30); Forty-Hour Week Convention, 1935 (No. 47); and Reduction of Hours of Work Recommendation, 1962 (No. 116).
- *weekly rest standards*: Weekly Rest (Industry) Convention, 1921 (No. 14); Weekly Rest (Commerce and Offices) Convention, 1957 (No. 106); and Weekly Rest (Commerce and Offices) Recommendation, 1957 (No. 103).
- Holidays with Pay Convention (Revised), 1970 (No. 132); Part-Time Work Convention, 1994 (No. 175), and Recommendation (No. 182); and Night Work Convention, 1990 (No. 171), and Recommendation (No. 178).<sup>32</sup>

The Model Law also draws on the most recent comprehensive statement on the form and objectives of international working time law by the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), and in particular the Committee’s suggestions for any future revision of the international standards (ILO, 2005).

Relevant transnational and national standards have also been consulted, including the most prominent working time instrument in the industrialized economies, the EU Working Time Directive, and the most advanced developing world standards on domestic work, the South African Sectoral Determination 7<sup>33</sup> and Uruguyan Act No. 18.065 on domestic work. Finally, in line with the observation made throughout this study that many forms of domestic work should be understood as situated on the continuum of care work, the regulatory regimes of other caring professions have been consulted, including the key ILO standard, the Nursing Personnel Recommendation, 1977 (No. 157).

The Model Law is not proposed as a universal model that can be applied without modification in all legal regimes. Nor is it a template for the proposed international standards, which must, given their role in the global regulatory hierarchy, have the capacity to embrace a variety of national regulatory models. It does, however, outline a coherent legal framework for the regulation of working hours in domestic work. It can therefore be used as a resource for the design of legal measures on working time at a range of regulatory levels and national settings that are suited to the specificities of domestic work. In particular, the Model Law indicates how domestic work might be regulated in a manner that complies with the existing international standards.

The Model Law draws on the principles elaborated in Section 4 to combine key elements of conventional working time laws with regulatory strategies that promote protected forms of flexibility. The “framed flexibility” model thereby combines constraints

<sup>32</sup> The Model Law does not address the working hours of children or young persons and therefore does not draw on the relevant international standards on their working hours, e.g. the Minimum Age Convention, 1973 (No. 138).

<sup>33</sup> The Sectoral Determination was issued under the South African Basic Conditions of Employment Act.

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on working hours with a degree of flexibility in favour of both employer and worker, and is composed of two parallel regulatory frameworks:

- a framework of hours limits and rest periods;
- “flexibility” provisions, designed to advance both employer- and worker-oriented forms of flexibility.

The first set of norms, the “framing” standards, limit working hours, establish minimum rest periods and designate certain periods as “unsocial”. In line with Bosch’s (2006) flexible SER approach, this dimension of the framed flexibility model retains the elements of standardized working time that are of enduring value. In contrast, the parallel “flexibility” framework recognizes the unpredictable requirements periodically inherent in certain domestic work occupations and draws in particular on the concepts of “working time capability” and “protective individualization” to extend to domestic workers the capacity to adjust their working hours in the interests of sustaining meaningful family, private and community lives. The following sections outline the primary elements of these twin frameworks.

## 6.1 The “framing standards”

The “framing standards” provide a structure that ensures the working time flexibility necessary for domestic work while constraining it in ways protective of the worker. The central elements of the framing standards, set out in Part B of the Model Law, are as follows:

- **Working Time Agreement (WTA).** The need for participation, clarity and transparency in the design of working time arrangements for individual domestic workers and their employer is recognized through a requirement that individual workers and employers conclude a Working Time Agreement (WTA) at the outset of their relationship. The WTA sets out the central features of the domestic worker’s hours, both in duration and arrangement. Designed to ensure that workers can easily enforce their legal rights, the WTA also outlines certain aspects of the broader labour law regime, such as the collective bargaining regime as it relates to working time, and information that will aid the worker to enforce legal entitlements, such as access to the labour inspectorate or grievance resolution mechanisms.
- **Normal hours.** A key element of ILO working time standards is the recognition that working time must be limited in some way. The standards since Convention No. 1 have recognized that the span of time over which a labour process has to be performed is not an acceptable measure of the span of time to be demanded of workers. Rather, decent work requires the acceptance of limits on the availability of the regulated worker’s labour for sufficient periods to protect his or her health and well-being. Such limits are reflected in the Model Law. As a general rule, eight hours a day and 40 hours a week can be worked before overtime payments are due. The daily limit is in line with the early international standards (C1; C30) and reflected in the Uruguayan Act No. 18.065 on domestic work. The weekly limit is derived from the most recent international standards (C47; R116) and has been identified by the Committee of Experts as the contemporary standard for weekly hours (ILO, 2005).
- **Overtime hours.** The Model Law assumes that there should be as little recourse to overtime as possible in domestic work, given the health and work/life implications of regular work beyond normal hours. For work/life reasons in particular, the

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worker is entitled to notice that he or she will be required to work overtime and can refuse unless there is an urgent and essential need for his or her services. Overtime work is constrained by a daily rest period (see below) and the 48-hour maximum on weekly hours suggested by the CEACR as an appropriate upper limit on overtime (ILO, 2005). In line with the international standards, overtime work must be remunerated at a premium of at least 25 per cent of the domestic worker's normal wage (C1; C30; R116).

- **Working time schedules.** In addition to limiting the length of working hours, the framing standards specifically regulate certain dimensions of working time schedules. The historically discriminatory treatment of part-time workers is recognized in a confirmation that the workers are entitled to the full range of rights contained in the Model Law. Equal treatment with comparable full-time workers, required by the Part-Time Work Convention, 1994 (No. 175), is also addressed, albeit in the assumption that this right is elaborated in more detail in a separate anti-discrimination measure. To prevent very short hours, domestic workers must be compensated when they report for work to find there is no work available or that they are expected to work for less than two hours. A prohibition on the hiring of domestic workers on an “as and when required” (or “casual”) basis to ensure that individual workers can be certain of their schedules in advance and are not subject to the precarious income these arrangements generally entail. The risk of fragmentation of the working day is addressed by providing incentives to arrange working hours continuously. The Model Law identifies a “span” of nine hours over which a worker's daily hours can be scheduled. Those whose hours are scheduled beyond the nine-hour span are subject to a normal day of seven hours, although he or she can elect to work eight-hour days and be compensated by additional annual leave. These provisions are accompanied by an absolute limit on the daily span of 13 hours.
- **Rest breaks.** To ensure adequate periods of rest within the frame of the working day, a rest break of at least one hour is to be taken in any period of work of at least five hours. This entitlement is drawn from the South African Sectoral Determination 7.
- **Daily rest periods.** A minimum daily rest period of 11 hours is mandated, mirroring the requirement of the EU Working Time Directive. This rest period recognizes that many domestic workers, in particular in households that hire only one worker, are required to work over an extensive daily span of hours; for example, many domestic workers are likely to be required to prepare both breakfast and dinner, and can therefore reasonably be assumed to work across the hours from 06:00 to 19:00. The framing standards recognize such an extensive span for the working day, while the daily hours limit prevents domestic workers from being required to work across this entire period.
- **Weekly rest days.** A one-day weekly rest period is specified that coincides with the country's traditional or customary day of rest. This entitlement is in line with the ILO's standards on weekly rest (C14; C106; R103.) The weekly rest provisions also recognize the presence of minority religious groups in the domestic labour force by ensuring that, where domestic workers would prefer to take the weekly rest period to coincide with a day recognized by their religious traditions, they are entitled to do so.
- **Night work.** Night work is singled out in order to address its repercussions for both health and safety and the reconciliation of paid work and family life. These effects are recognized in requirements that night work be subject to shorter daily and weekly hours, additional compensation and adequate notice. Further, night

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work is entirely prohibited in hazardous or arduous work, and to recognize the particular nature of domestic work, conventional legal definitions of arduous work are expanded to acknowledge the emotional demands of much domestic labour. The framing standards also contain entitlements to health assessments, protection from occupational hazards, and assistance with travelling to work where it may be dangerous for the domestic worker to travel at night or difficult to arrange.

- **Leave and holidays.** The Model Law mandates paid annual leave of three working weeks in line with the Holidays with Pay Convention (Revised), 1970 (No. 132). Domestic workers also have an entitlement to the public holidays that are available to the general labour force and to paid sick leave of ten days.<sup>34</sup>
- **Working hours and wages.** The Model Law recognizes the relationship between working hours and wages and the interconnection of the regulatory models that govern each. It requires employers to ensure that domestic workers are remunerated at a level that can sustain a decent standard of living without recourse to excessive working hours, in line with *general ILO principles*. It also singles out excessively short hours, requiring that they be avoided if possible. It is assumed that the intricacies of wage regulation will be elaborated in separate wage laws, which may specify, for example, a minimum wage, mechanisms for determining and adjusting wage levels, and standards for frequency and modes of payment.

## 6.2 The “flexibility” standards

The second dimension of the framed flexibility model embraces norms intended to provide for two exigencies: the employer’s need for the emergency presence of the worker and the worker’s need for time to devote to elements of his or her life beyond waged labour. These “flexibility” standards are therefore fashioned to recognize and facilitate unpredictable demands while ensuring protection for domestic workers. In particular, taking account of the number of domestic jobs that involve care work, the standards facilitate the level of flexibility suited to a care work profession, yet they also draw on contemporary innovations that enhance the autonomy of the individual worker. The following sections outline the three elements of the temporary flexibility standards: “on-call” work, working time adjustments and family emergency leave.

### 6.2.1 On-call work

Among the most pressing questions for regulatory frameworks on domestic work is how to address periods in which workers must remain “on-call” or “standby”, during which they are not required to carry out their primary tasks but to be ready to return to duty as and when they are required by the employer. As the unpredictability in working hours highlighted in Section 2.1 suggests, the nature of domestic work implies that employees may be called upon at short notice to perform tasks for which it is difficult or impossible to plan in advance. The conceptualization of such hours spent on-call, however, is not well-developed in labour law regimes, which tend to embody a strictly bilinear conception of time as either “working hours” or “rest periods”.<sup>35</sup> Thus Supiot has singled out a “third” kind of “on-call time” that is neither clearly working time nor rest, and notes that its

<sup>34</sup> It is assumed that maternity leave is covered as part of a separate legislative scheme on maternity protection.

<sup>35</sup> This classification is most prominent in the EU Working Time Directive, which defines “rest periods” simply as periods that are not working time.

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“classification and legal regime have yet to be defined in labour law” (Supiot, 1999, p. 81; see also Mundlak, 2005).

The regulation of on-call work has, in some settings, been paired with a conception of the objectives of working time regulation that ties regulation to productivity, by characterizing working hours as amenable to regulation only when they are fully productive. Working time and wage laws have always deployed the notion of “working time” as a proxy for productivity (Supiot, 1999); the “productivity regulation” model instead precludes periods designated as inactive from the legal notion of working time, and therefore from the parameters of regulated work. This model has, albeit implicitly, been injected into legal discourses on working time in recent years, where it has been advanced to designate periods of work as either productive or non-productive. This classificatory system has been applied in particular to occupations, most notably in the health sector, that skirt the binary divide found in working time laws between “working time” and “rest” by involving periods in which the employee is “on-call” or “standby” rather than engaging in the productive components of his or her job. The productivity regulation model consigns working time regulation solely to the realm of paid work, and is therefore in stark contrast to the alternative work-family/work-life models. The latter, by conceptualizing paid labour as “time out of life”, ground the regulation of working hours in the demands of the periods conventionally designated as “rest” (McCann, 2004).

Productivity has a long-standing presence in the field of domestic work regulation: the characterization of domestic work as unproductive in its entirety is a well-documented driver of its history of legislated exclusion (Cancedda, 2001). While the international standard-setting exercise confirms the fading influence of this image of domestic labour, its legacy can be traced in certain of the models designed as part of recent efforts to regulate domestic work, which differentiate periods of “inactivity” from productive hours.

Complicating this picture is a regulatory technique, apparently of relatively recent origin, which bifurcates working hours into what have been characterized as “active” and “inactive” periods.<sup>36</sup> This activity/inactivity distinction has been most prominent in the recent unsuccessful efforts to revise the EU Working Time Directive, in which it was proposed to permit the extension of hours limits in jobs that involve substantial periods of “inactivity” (European Commission, 2005). This classification has also been mapped onto domestic work in certain of the regulatory models generated by efforts to formalize the sector. The French collective agreement on domestic work (*Convention Collective Nationale des Employées de Maison*) extends this distinction to domestic workers in caring roles (*postes d’emploi à caractère familial*), with implications for the intersection of wages and hours regulations. Working hours in these posts are classified as either active (*travail effective*) or inactive (*heures de présence responsable*). The latter are characterized as devoted solely to remaining available to perform the primary tasks of the job<sup>37</sup> and can be remunerated at 75 per cent of the standard rate, provided that a minimum of 25 per cent of total hours are remunerated at the full basic rate<sup>38</sup> (see Le Feuvre, 2000).

The activity/inactivity model of working time regulation risks conflicting with a number of the principles enunciated in Section 4. By tying the regulation of working hours and wages to productivity, it can permit longer and variable hours and reduced wages, undermining the universality of working time models by threatening both the coherence of

<sup>36</sup> This terminology is derived from a 2005 proposed revision to the EU Working Time Directive. See European Commission, 2005.

<sup>37</sup> Article 25.

<sup>38</sup> Article 16.

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these bodies of law as a whole and also the mainstream regimes, through the downgrading dynamics of fragmentary regulation. It also mitigates against the work/family objective outlined in Section 3.1 by embodying an implicit assumption about the appropriate role for working hours limits, perhaps derived from the health and safety rationale, that hours limits are intended to recognize the arduousness of labour rather than to constrain the periods workers spend away from their families or other elements of their lives (McCann, 2008). Finally, this model raises the potential for a fragmented notion of working time to be deployed in other contexts, including as part of efforts to drain “slack time” from the working day (see Supiot, 1999, on the notion of “slack time”).

Moreover, these models also risk problems of classification when mapped onto the realities of work organization in the sector. Where a domestic worker is present at the workplace, the distinction between inactive and active hours may not be clear-cut, and supposedly “inactive” hours not necessarily devoid of labour. Le Feuvre reports on such an experience under the French model in the words of a care worker:

*What does that mean, active hours and passive hours? You care for the child; those are active hours, when it's awake; you play games, you feed it, you clean it up. And when you're doing passive hours in their eyes, that's when the child's having its nap, but I'll tell you what I do when the child's asleep – I do the dishes, I do housework, I do the ironing. I don't call that passive. (Le Feuvre, 2000, pp. 59-60)*

This bifurcation of working hours along the lines suggested by the productivity-regulation models contrasts with the unitary conception of working time offered by traditional working time laws, including the international standards. The ILO standards embody a notion of “hours of work” that embraces both activity and availability, as “time during which the persons employed are at the disposal of the employer”.<sup>39</sup> This formula has been interpreted by the CEACR as embracing periods during which workers are under a duty to “be at the disposal of the employer until work is assigned” (ILO, 2005, paragraph 46). Such a unitary notion of working time is also found in other jurisdictions. In the landmark *SIMAP* and *Jaeger* decisions, for example, the European Court of Justice interpreted the notion of “working time” in the EU Working Time Directive to preclude the exclusion of doctors’ on-call periods from the Directive’s hours limits.<sup>40</sup> This unitary conception of working time is in line with the conventional role of working time regulation in curbing working hours for health and productivity reasons. It also embraces a “time out of life” approach, by capturing not only the productive components of paid work, but also its negative dimension of working hours, as a loss of time that workers could otherwise devote to their families or other aspects of their lives.

Alternative models, while embodying a unitary conception of working time, permit longer hours for employees whose jobs involve substantial standby periods. The early international standards, in which such jobs are characterized as “essentially intermittent”, allow exceptions from their daily and weekly limits;<sup>41</sup> and some national laws extend the notion of intermittent work to characterize occupations that can be performed in private households, most notably guarding and surveillance jobs, and either permit longer hours or entirely exclude these jobs from hours limits. These models, while retaining the richer notion of working time, can be subject to many of the criticisms directed at the activity/inactivity models, in particular in their resistance to the reorientation of working

<sup>39</sup> Convention No. 30, Article 2.

<sup>40</sup> Case C-303/98 *SIMAP v Conselleria de Sanidad y Consumo de la Generalidad Valenciana*; Case C-151/02 *Landeshaupstadt Kiel v Jaeger*.

<sup>41</sup> Convention No. 1, Article 6(1); Convention No. 30, Article 7(1)(a). See Section 5.2 above.

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time law along work/family objectives. This is particularly true where the activities of the worker are highly restricted, such as that he or she must remain on the premises of the employer. Indeed, these provisions can be suggested to reflect the gendered understandings of the division of domestic labour that permeate the early standards (Murray, 2001) by equating time spent beyond paid labour with “leisure time”.

Sophisticated regulatory models have been designed for a number of the caring professions that can be brought to the aid of developing a more coherent approach to conceptualizing and regulating work in the domestic services sector. These kinds of model have also been developed specifically for domestic work, most prominently in the South African Sectoral Determination No. 7. Such approaches recognize the need for unscheduled work while simultaneously protecting workers through hours limits, notice periods and pay premia. They preserve the unitary nature of the legal concept of working time and sustain work/family-oriented regulation by deploying the notion of “working time” to embrace all periods spent at the workplace during a legally constrained standard workweek while carving out a specifically regulated “third kind of time” (Supiot, 1999, p. 81). Such “on-call hours” are then regulated by limiting their incidence and duration, reducing the uncertainty they cause for the employee, and ensuring that they are compensated.

Drawing on these models, the Model Law addresses on-call work without recourse to notions of “inactive” or “active” time. Rather, it deploys a distinction between “internal” and “external” on-call periods. The key provisions are as follows:

- **Prerequisites.** For a domestic worker to be assigned to on-call duty, certain conditions must be complied with. A written agreement must be concluded between the individual worker and employer before on-call work is introduced. Subsequently, the domestic worker is entitled to seven days’ notice of the requirement to be on-call.
- **Call-out criteria.** Since on-call work restricts the worker’s autonomy, the circumstances in which he or she can be called on to work are limited. Call-outs are permitted only where there is an urgent and essential need for the domestic worker’s services, such as where there is an imminent risk of injury to a person for whom he or she is caring. Further, during the on-call period domestic workers must not be requested to undertake duties other than those for which they were called out; and when the urgent need has been addressed, the call-out period must come to an end.
- **Call-out duty.** Periods during which the worker is called-out to work are counted as working time and treated in the same way as ordinary working hours. These periods are therefore subject to the “framing standards” on hours limits, rest periods, etc., and must be remunerated as working time.
- **“Internal” on-call work.** On-call time in which the worker is at the workplace are defined as internal on-call periods and counted as working time. This approach to internal on-call duty is therefore in line with the definition of working time reflected in the international standards and the jurisprudence of the European Court of Justice. The Model Law also requires that internal on-call workers have access to a secure, private room, in the recognition that if no such room is provided their entitlement to adequate rest is undermined. International on-call workers are also entitled to additional remuneration if this room is shared with a person for whom they are caring.
- **“External” on-call work.** On-call time spent outside of the workplace is not captured by the definition of working time unless the domestic worker is subject to

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a degree of obligation comparable to internal on-call periods. Instead, these periods are regulated through the imposition of hours limits and a requirement for compensation. A domestic worker can only be required to be on-call on an external basis for a period of no more than three days, to a maximum of five times a month and 50 times a year. These periods attract an “on-call allowance” of at least 25 per cent of the ordinary wage, and, where the worker is called-out, he or she must be remunerated at a premium rate.

- **“Live-in” workers.** To prevent the exploitation of the particularly vulnerable category of “live-in” domestic workers, all of their periods of on-call duty are classified as internal.

## **6.2.2 Working time adjustments**

The second element of the flexibility standards is inspired by the recent regulatory trend towards permitting individual workers to influence the duration and scheduling of their working hours. These “individual choice” measures have been prominent in the Netherlands and Germany, and more recently extended to the United Kingdom, Australia and New Zealand (see, for example, Lee and McCann, 2006). Grounded in the universality principle outlined in Section 4, this element of the Model Law is intended to permit a group of vulnerable workers to share in a regulatory advance of mainstream working time law. To this end, the Model Law extends two central entitlements to domestic workers.

- **Planned adjustments to working hours.** An obligation is placed on the employer when making substantial changes in a domestic worker’s hours to inform the worker and discuss options for implementing these changes. The preferences of the domestic worker must be taken into account.
- **Right to request working time adjustments.** Domestic workers are entitled to request changes in either the duration or arrangement of their working hours. These requests must be granted unless they conflict with an essential need on the part of the employer for the domestic worker’s services. Various supportive requirements are outlined, including that the employer must provide a written response to working time adjustment requests, and that the worker must not be discriminated against on the grounds that he or she made such a request. There is a stronger obligation to grant the request where it has been made on the grounds identified in the Part-time Work Recommendation, 1994 (No. 182), to enable the worker to care for a young child or disabled or sick family member.

## **6.2.3 Emergency family leave**

Finally, the flexibility standards provide for leave periods to enable domestic workers to address urgent family concerns, while recognizing that elements of their private lives may be situated in another country or region. Domestic workers are entitled to at least five days’ paid leave per year to attend to family emergencies, reflecting the entitlement under the South African Sectoral Determination 7. A longer period of eight days is available to migrant workers who need to return to their country of origin.

## **6.3 Monitoring standards**

### **6.3.1 Documentation**

Tracking the hours actually worked by domestic workers is frequently considered a substantial obstacle to the effective regulation of working hours. Indeed, this issue was



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highlighted by a number of ILO member State governments in their response to the initial communications from the International Labour Office on the potential for international standards on domestic work (ILO, 2009). Keeping accurate records on working hours, rest periods and other dimensions of working time, however, is essential to effective regulation. Documentation assumes a prominent role under sophisticated regulatory models and is particularly acute under regulatory frameworks that promote forms of working time flexibility beyond conventional working time arrangements of the kind outlined in the Model Law.

The reluctance to keep records may, in part, be due to a broader cultural perception that household matters should not be subject to state oversight. However, this contention can easily be rebutted. It is apparent that private households are subject to a range of tax, financial and property-related obligations that entail the keeping of records and require them to account to state bodies. The need to record and report on domestic workers' hours, then, can best be understood as part of a continuum of obligations on private households to maintain and retain records.

The approach of the Model Law is to facilitate this record-keeping process, and therefore compliance with the law, by outlining the information that should be recorded. To this end, a list is enunciated in Part D of the Model Law of the information on which working time records should be kept, including, for example, daily and weekly working hours, overtime hours and premia, leave days and public holidays, and details of night work and on-call work performed. The presence of such a list in statutory or collective instruments, however, is not sufficient to ensure widespread compliance with record-keeping obligations, and the level of concern about the adequacy of documentation is such to suggest that a degree of innovation and experimentation would be useful. The strategies used would inevitably depend on the setting in which they are deployed, although one option would be for a standard "checklist" to be made available to employers, in hard copy or online as appropriate. These kinds of technique would be the subject of the periodic reviews of the legal framework outlined in the following section.

### **6.3.2 Monitoring**

In line with the principle of innovative regulation outlined in Section 4, it is essential to monitor the effectiveness of regulatory frameworks on domestic work. It has previously been argued that regulatory frameworks should be dynamic, in the sense of incorporating processes of evaluation and incremental reform. This goal underpins the Model Law, which mandates a process of periodic consultation between the government and representative organizations of domestic workers and employers at the national level to review methods of monitoring domestic workers' hours and the implementation and enforcement of the legal standards. The Model Law also requires periodic evaluation of the influence of the statutory standards, at least once in each seven-year period, and imposes an obligation on workers' and employers' organizations to educate and assist their constituents on compliance with the law.

### **6.4 Incentives to bargain**

A central objective in the design of the Model Law was to provide incentives for collective bargaining. This modern regulatory strategy is adopted to recognize that the collective organization of domestic workers is substantially under-developed, even in settings in which unionization is otherwise widespread, and that it may not be possible to identify an employers' association with the capacity to bargain collectively over the terms and conditions of domestic workers. Yet, collective bargaining is likely to be the most effective method of improving the quality of domestic employment, and encouraging the

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formation of collective organizations of workers and employers, and of regular bargaining, is therefore a central regulatory goal.

To provide such incentives, the Model Law draws on precursors from the EU legal regime, the Parental Leave<sup>42</sup> and Information and Consultation Directives,<sup>43</sup> both of which offer statutory frameworks as a default that apply only when not displaced by collectively bargained alternatives. In the Model Law, a number of standards can be adjusted by collective agreements between representative organizations of domestic workers and employers. The incentives it offers, which are intended to “seed” bargaining structures and processes, generally take the form of enhanced working time flexibility. Among the “framing standards”, for example, agreements can substitute additional rest periods for wage premia in overtime work and work on weekly rest days or public holidays, and introduce hours-averaging schemes to address periods of unpredictable demand rather than relying primarily on overtime work. The “flexibility standards” are also subject to collective derogation. Collective agreements can adjust the limits on external on-call periods, while the procedure for working time adjustments is to be established through national-level negotiations where possible. The Model Law also endeavours to sidestep the limitations of the EU models, which have been criticized for their failure adequately to constrain bargained outcomes. To this end, it requires comparable levels of protection (e.g. the bargained limits on on-call periods must be “equally protective” to the statutory limits) and incorporates a degree of individual choice for workers (e.g. a domestic worker’s agreement is needed in order to swap compensatory rest for overtime premia).

<sup>42</sup> Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, extended to the United Kingdom by Directive 97/75/EC.

<sup>43</sup> Directive 2002/14/EC .....[full title needed].

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## 7. Conclusion

The objective of this study has been to conceptualize the working hours of domestic workers as a subject of legal regulation and to consider the nature and form that regulatory measures might take effectively to govern this segment of the global labour force. The study has drawn on the traditions of working time regulation by the ILO, and the burgeoning contemporary literature on working time to develop an integrated, universal, and flexible and comprehensive approach to the problem.

The study first identified the regulatory dimensions of contemporary working time patterns in domestic work. It then reviewed the variables that shape the diversity of domestic work, in particular legal modes of engagement and the stage in the life-course and citizenship status of the domestic worker. Conceptual advances within the research and policy literature on working time were then highlighted. It was suggested in particular that the recent focus on work/family reconciliation as an objective of working time law highlights the ways in which domestic work may be damaging to family life of the worker. The approach in this study builds on advances in the mainstream of working time law that address the work/family issue and call for them to be extended to domestic workers. Domestic work was also identified as a form of precarious work, requiring interventions that address the interplay of flexibility and protection, and the notion of working time flexibility was analysed both to expose working time arrangements in domestic work as embodying unconstrained flexibility and to consider how “regulated” forms of flexibility could be integrated into the design of legal frameworks.

Drawing on these insights, the study elaborated a set of principles to underpin the regulation of working time in domestic work. The evolution in the scope and role of the international standards was then reviewed and an argument made that an international standard on domestic work is called for, given the broad trajectory of ILO standards. Finally, it was contended that to regulate domestic work, a “framed flexibility” model should be adopted, which permits the kinds of flexibility needed in many domestic jobs while simultaneously offering sufficient protection to workers to ensure decent work.



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## **Annex**

### **Model Law on working time in domestic work**

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## ***List of abbreviations***

### **ILO**

C1	Hours of Work (Industry) Convention, 1919 /No. 1)
C14	Weekly Rest (Industry) Convention, 1921 (No. 14)
C30	Hours of Work (Commerce and Offices) Convention, 1930 (No. 30)
C47	Forty-Hour Week Convention, 1935 (No. 47)
C106	Weekly Rest (Commerce and Offices) Convention, 1957 (No. 106)
C132	Holidays with Pay Convention (Revised), 1970 (No. 132)
C171	Night Work Convention, 1990 (No. 175)
C175	Part-time Work Convention, 1994 (No. 175)
R103	Weekly Rest (Commerce and Offices) Recommendation, 1957 (No. 103)
R116	Reduction of Hours of Work Recommendation, 1962 (No. 116)
R157	Nursing Personnel Recommendation, 1977 (No. 157)
R178	Night Work Recommendation, 1990 (No. 178)
R182	Part-time Work Recommendation, 1994 (No. 182)

### **EU**

WTD	Working Time Directive
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### **National**

L18.065	Uruguayan Act No. 18.065 on domestic work
SD7	South African Sectoral Determination 7

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## Part A: Definitions

### 1. For the purposes of this framework:

“working time” means time during which the domestic worker is at the disposal of the employer and available to undertake his or her duties; working time includes the time a domestic worker spends travelling to a worksite other than the worker’s usual place of work, or where the domestic worker travels with the employer or members of the employer’s household, the travel periods count as working time; where the domestic worker performs assignments for an intermediary, such as a temporary work agency, periods during which the worker travels between assignments count as working time;

“rest” means any period during which the domestic worker is not required to be present in the workplace, is not expected to be available to undertake his or her duties and is not required to be contactable by the employer; in the case of “live-in” domestic workers and those undertaking “external on-call work” who are required to spend the night on the employer’s premises, only periods during which the worker has unimpeded access to a private and secure room that meets all minimum accommodation requirements set out in relevant laws or collective agreements are counted as periods of rest;

“on-call duty” means a period of working time during which the domestic worker is required to be at the disposal of the employer by being ready, willing and able to return to duty as required;

“internal on-call duty” means a period of on-call duty during which the worker is on-call at the workplace or any other place designated by the employer;

“external on-call duty” means on-call duty during which the worker is at home or other place of his or her choice; where the degree of availability of the worker is such that it is equivalent to a requirement to remain on the premises of the employer, the on-call period is classified as internal on-call duty;

“night work” means a period of at least four hours performed between the hours of 18:00 and 06:00;

“live-in” domestic worker means a worker whose permanent residence is on the premises of the employer or other place of the employer’s choosing;

“employer” means the person or entity legally recognized as the domestic worker’s employer; where it is not the employer of the domestic worker, a temporary work agency or other intermediary that assigns domestic workers to third parties, is jointly liable with the employer for ensuring that the provisions of this law are complied with.

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## Part B: Framing standards

### 2. The Working Time Agreement (WTA)

2.1 At the start of the employment contract, the employer and domestic worker will negotiate a Working Time Agreement (WTA) that will, as far as possible, reflect the preferences of both parties on the duration and scheduling of the domestic worker's hours.

2.2 At the conclusion of the negotiations, the employer shall provide the domestic worker with a copy of the WTA written in accessible terms and in a language the domestic worker understands [SD7, Clause 9(2)].

2.3 The WTA must include the terms agreed between the domestic worker and the employer on:

- (a) the duration of normal daily and weekly working hours;
- (b) the days on which the work will be performed;
- (c) the details of any reference period over which weekly hours may be averaged;
- (d) rest breaks, including periods of daily rest and weekly rest;
- (e) the conditions under which overtime work may be requested by the employer and the amount of additional payment for this work, where relevant;
- (f) any agreement relating to work at night and the amount of additional payment for this work, where relevant;
- (g) paid leave entitlements;
- (h) public holiday entitlements and the amount of additional payment for work performed on public holidays, where relevant;
- (i) whether or not on-call work will be required and details of the scheme;
- (j) mechanisms for adjustments to working hours at the initiative of the domestic worker and the employer;
- (k) collective bargaining rights on working time;
- (l) information on how to access the state inspection and domestic workers advisory services on working time, and any national grievance resolution system available to workers generally;
- (m) any other relevant matters agreed between the parties.

### 3. Daily normal hours

3.1 The normal working hours of domestic workers shall not exceed eight hours in any 24-hour period (C1; C30).

3.2 Exceptions are permitted for domestic workers engaged on hours averaging schemes (Section 9 below) and on-call work (Part C, Chapter 1 below).

3.3 Except where provided elsewhere in this law, normal hours of work shall be continuous [R157, Paragraph 33(1)].

3.4. The normal working hours of night workers shall not exceed seven hours in any 24-hour period [R178, Paragraph 4(2)].

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3.5 Where the daily span of hours exceeds nine hours, the provisions in Section 11.4 apply.

## **4. Weekly normal hours**

4.1 The normal working hours of domestic workers shall not exceed:

- (a) 40 hours per week (C47, R116); and
- (b) 48 hours per week including overtime (ILO, 2005).

4.2 The normal working hours of domestic workers who are night workers shall not exceed:

- (a) 35 hours per week; and
- (b) 42 hours per week, including overtime.

## **5. Rest breaks**

5.1 During each period of working time of five hours or more, domestic workers are entitled to a paid rest break of at least one hour (SD7, Article 15).

5.2 Collective agreements concluded between representative organizations of domestic workers and organizations of employers may reduce the paid rest break to 30 minutes, provided the normal span of daily hours is reduced by 30 minutes as a result of this change.

5.3 Domestic workers who work more than ten hours are entitled to an additional rest break of 30 minutes after eight hours of work.

## **6. Daily rest**

6.1 The minimum period of daily rest for a domestic worker must be at least 11 consecutive hours in each 24-hour period (WTD, Article 3).

6.2 An exception from this requirement is permitted for external on-call work (Part C, Chapter 1 below).

## **7. Weekly rest**

7.1 Domestic workers are entitled to a rest period of at least 24 consecutive hours [C14, Article 2(1); C106, Article 6(1)] in each seven-day period, which must coincide with the traditional or customary day of rest [C14, Article 2(3); C106, Article 6(4); L18.065, Article 4].

7.2 In work that involves special hazards or a heavy physical, mental or emotional strain, the domestic worker is entitled to a weekly rest period of 48 hours [R 157, Paragraph 36(1)].

7.3 Where, due to his or her religious beliefs, a domestic worker would prefer to take weekly rest on a different day, he or she is entitled to do so [C106, Paragraph 6(4)].

7.4 A domestic worker may be asked to work on the weekly rest day only in cases of urgent and essential need for the domestic worker's services, such as an imminent risk of injury to those in his or her care.

7.5 Where a domestic worker works on a weekly rest day, he or she must be compensated in the form of either:

- (a) remuneration at the ordinary rate plus at least 100 per cent; or

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- (b) where provided for in a collective agreement concluded by representative organizations of domestic workers and organizations of employers, a period of compensatory rest of two hours for each hour worked (or part thereof); the compensatory rest period is to be taken as soon as possible after the weekly rest day, and in any event within one month, and at a time acceptable to both the employer and domestic worker.

7.6 Exceptions can be permitted for domestic workers engaged on external on-call work (Part C, Chapter I.III below).

## **8. Overtime work**

8.1 All hours worked beyond normal hours, including the normal hours of part-time workers, shall be deemed to be overtime hours and compensated as such (R116, Paragraph 16).

8.2 As an exception to Section 8.1, where a domestic worker is engaged to work under an hours averaging scheme as outlined in Section 9, each hour or part thereof worked in excess of the total number of hours permitted over the reference period as a whole is deemed to be overtime and must be compensated as such.

8.3 There should be as little recourse to overtime work as possible [R157, Paragraph 37(1)].

8.4 Except in cases of an urgent and essential need for the domestic worker's services, domestic workers are entitled to at least three days' notice of the requirement to work overtime hours.

8.5 Except in cases of an urgent and essential need for the domestic worker's services, such as an imminent risk of injury to those in his or her care, the domestic worker may refuse the employer's request to work overtime.

8.6 Overtime hours must be compensated in the form of either:

- (a) remuneration at the ordinary rate plus at least 50 per cent [SD7, Clause 12(1)];
- (b) where provided for in a collective agreement concluded by representative organizations of domestic workers and organizations of employers and agreed between the individual domestic worker and his or her employer, a period of compensatory rest of at least 90 minutes for each hour of overtime worked (or part thereof); this compensatory rest period is to be taken as soon as possible after the overtime period and in any event within one month [SD7, Clauses 12(2) and (3)(a)] and at a time acceptable to both the employer and domestic worker.

## **9. Collectively agreed hours-averaging**

9.1 To address periods of unpredictable demand for the services of a domestic worker, representative organizations of domestic workers and organizations of employers may negotiate a scheme which permits a domestic worker and his or her employer to agree on a reference period of not more than four weeks over which the normal weekly hours of domestic workers shall be averaged (R116, Paragraph 12), provided that

- (a) during each seven-day period during the reference period, working hours must not exceed a total of 56 hours;
- (b) no more than three four-week periods of hours-averaging is permitted in each 52-week period;
- (c) hours-averaging is not permitted for domestic workers who undertake a substantial proportion of their working hours at night.

9.2 The relevant collective agreement must outline the elements of the hours-averaging scheme, including the circumstances in which hours averaging is permitted; in particular, the collective agreement should specify that:

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- (a) the domestic worker will be paid on a weekly basis in the form of a fixed sum for each week of the scheme's operation plus any wage premia;
  - (b) hours-averaging schemes may only be introduced where the domestic worker agrees, and regard has been had to the domestic worker's own family and care duties and working time preferences;
  - (c) the weekly hours schedule as agreed will be recorded in writing and a copy made available to the domestic worker;
  - (d) the domestic worker will be provided with at least seven days' notice of his or her weekly hours schedule.

## 10. Working hours schedules

10.1 Domestic workers who work on a part-time basis are entitled to all of the entitlements contained in this framework, on a pro rata basis where appropriate (C175);

Part-time domestic workers are entitled to equal treatment with comparable full-time workers of the employer in line with the applicable laws and collective agreements on the equality of part-time workers (C175).

10.2 Where a domestic worker has been required to work, including as part of a period of on-call work, and is willing and able to commence work and work of less than two hours is provided, he or she must be paid a minimum of two hours' pay plus travel time at the ordinary rate;

An alternative method of remuneration for travel time may be determined through negotiations between representative organizations of domestic workers and organizations of employers.

10.3 Having regard to the particular vulnerabilities of domestic workers, it is prohibited to employ a domestic worker on an "as and when required" ("casual") basis.

10.4 The normal working hours of domestic workers whose span of daily working time (the period between the start and end of the working day) is more than nine consecutive hours shall not exceed seven hours in any 24-hour period; alternatively, at the behest of the domestic worker, he or she may work an eight-hour day and be compensated in the form of additional paid annual leave, in terms of Section 13, at a rate of at least one hour for every hour worked beyond the nine-hour span.

10.5 Under no circumstances may the domestic worker's normal daily hours be extended over a period of more than 13 hours.

## 11. Night work

11.1 Domestic workers who perform any work between 18:00 and 06:00 are entitled to be compensated for these hours in the form of either:

- (a) remuneration at the ordinary rate plus a night work premium [C171, Article 1(a)] of at least 50 per cent on weekdays and at least 100 per cent on weekly rest days and public holidays;
- (b) where provided for in a collective agreement concluded by representative organizations of domestic workers and organizations of employers and agreed between the individual domestic worker and his or her employer, a period of compensatory rest of 90 minutes for each hour of night work performed on weekdays and two hours for work performed on weekly rest days and public holidays.

11.2 If more than half of the hours in a 24-hour period are performed at night, the compensation outlined in Section 11.1(a) is applicable for all work undertaken in that 24-hour period.

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11.3 Except in cases of an urgent and essential need for the domestic worker's services, such as an imminent risk of injury to those in his or her care, the worker should be given at least seven days' notice of a requirement to perform night work (R178, Paragraph 21).

11.4 Overtime hours are not permitted where any work undertaken between 18:00 and 06:00 involves special hazards or a heavy physical, mental or emotional strain [R178, Paragraph 5(2)].

11.5 Where travel to the workplace to perform night work will involve danger to the domestic worker or considerable disruption, the employer must ensure that a safe mode of transport is available, such as through the provision of a travel allowance.

11.6 Domestic workers who work at night are entitled to a health assessment paid for by the employer:

- (a) before commencing a period of night work in terms of the Working Time Agreement;
- (b) at regular intervals thereafter; and
- (c) if they experience health problems that may be related to working at night (C171, Article 4).

11.7 The employer should take necessary measures to maintain during night work the same level of protection against occupational hazards as during the day, in particular by avoiding, as far as possible, the isolation of workers (R178, Paragraph 12).

## **12. Public holidays**

12.1 Domestic workers are entitled to the same public holidays as other workers.

12.2 Where a domestic worker celebrates public holidays that differ from those recognized in the country of his or her employment, he or she is entitled to take at least one of these holidays in lieu.

12.3 Domestic workers may be required to work on a public holiday where there is an urgent and essential need for the domestic worker's services, such as an imminent risk of injury to individuals in his or her care.

12.4 Where a domestic worker works on a public holiday, he or she must be compensated in the form of either:

- (a) remuneration at the ordinary rate plus at least 100 per cent; or
- (b) where provided for in a collective agreement concluded by representative organizations of domestic workers and organizations of employers and agreed between the individual domestic worker and his or her employer, a period of compensatory rest of two hours for each hour worked (or part thereof); the compensatory rest period is to be taken as soon as possible after the public holiday, and in any event within one month, and at a time acceptable to both the employer and domestic worker.

## **13. Paid annual leave**

13.1 The domestic worker is entitled to paid annual leave of no less than three working weeks (C132, Article 1) on the same basis as other workers.

13.2 Domestic workers engaged in work that involves special hazards or a heavy physical, mental or emotional strain, are entitled to four working weeks' leave [R157, Article 39(2)].

13.3 During the annual leave period, a domestic worker cannot be required to remain at the employer's household; periods spent accompanying the household on vacation do not count towards the leave period.



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## **14. Paid sick leave**

14.1 Domestic workers are entitled to sick leave of at least ten paid days per year (SD7, Paragraph 20).

14.2 While on sick leave, the domestic worker's employment relationship shall be maintained and he or she shall not lose continuity of service for any purpose (R157, Paragraph 41).

14.3 Legally binding national-level collective agreements concluded by representative organizations of domestic workers and organizations of employers may establish a national scheme for paid sick leave for domestic workers.

## **15. Working hours and wages**

15.1 Employers should ensure that domestic workers are remunerated at a level that sustains a decent standard of living without recourse to excessive working hours, including by avoiding excessively short periods of engagement.

15.2 Representative organizations of domestic workers and organizations of employers shall engage in regular negotiations on working hours and wages that take into account the principle set out in Section 15.1.

15.3 Representative organizations of domestic workers and organizations of intermediaries that assign workers to third parties shall engage in regular negotiations on working hours and wages;

As part of these negotiations, they shall design and review methods of ensuring that domestic workers' hours of work are sufficient to ensure that they earn a decent income, taking into consideration at least the elements set out in the Minimum Wage Fixing Convention, 1970 (No. 131), Article 3, without recourse to hours beyond the limits set out in this Model Law; the possibility of setting a mandatory minimum hours of engagement standard to secure a guaranteed income for the most vulnerable domestic workers should be considered.

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## Part C: Flexibility standards

### Chapter 1: On-call work

#### I. General

##### 16. Prerequisites

16.1 For a domestic worker to undertake on-call duty, the following prerequisites must be complied with:

- (a) a written agreement must be concluded between the domestic worker and the employer to the effect that the worker is prepared to undertake on-call duty;
- (b) the domestic worker must be given at least seven days' notice of the on-call period; where the domestic worker performs call-out duty without such notice, he or she is entitled to at least a 25 per cent addition to his or her hourly wage during the call-out period and, in the case of external on-call work, a three-hour extension of the daily rest period to which she is entitled under Section 6.

##### 17. Call-out criteria

17.1 During a period of on-call duty, the domestic worker may be called-out only to respond to an urgent and essential need for his or her services, such as an imminent risk of injury to a person in his or her care.

17.2 The call-out period must come to and end when the emergency is no longer imminent or has been adequately addressed.

17.3 Until called-out, the domestic worker must not be requested to undertake any other duties.

#### II. Internal on-call work

##### 18. Internal on-call periods

18.1. Internal on-call periods count as working time for all purposes (C30, Article 2; ILO, 2005).

18.2 During internal on-call periods, the domestic worker must be provided with a secure, private room that complies with minimum accommodation requirements set out in the applicable laws, regulations or collective agreements.

18.3 As an exception to Section 18.2, where it is essential that a domestic worker be present during an on-call period in a room with a person for whom they are caring, he or she is entitled to remuneration at the ordinary rate plus 25 per cent for every hour of the on-call period, irrespective of whether he or she receives a call-out request.

18.4 All on-call duty performed by "live-in" domestic workers is classified as internal.

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## **III. External on-call work**

### **19. Limits on on-call and call-out periods**

19.1 A domestic worker can only be required to be on-call on an external basis on a maximum of:

- (a) five periods of a maximum of three days in any four-week period; and
- (b) 50 times per year [SD7, Clause 14(3)].

19.2 The limits in Section 19.1 can be adjusted by a collective agreement concluded between representative organizations of domestic workers and organizations of employers, provided that the limits set by the collective agreement are equally protective of decent work for the domestic workers involved.

19.3 A worker can be required to be on-call on a maximum of two weekly rest days in every four-week period.

19.4 Periods during which the domestic worker is called out to work count as working time for all purposes and are to be remunerated as such (R 157, Annex, Paragraph 21).

19.5 Under no circumstances shall a period of call-out extend beyond a total of eight hours.

### **20. Breaks following call-out periods**

20.1 On the completion of a call-out period that has prevented the domestic worker from enjoying the daily rest period required by Section 6, the worker must not be required to commence their next period of work for at least 14 hours.

20.2 Where the domestic worker has performed a period of on-call work during which:

- (a) he or she was recalled to duty more than once; or
- (b) he or she was recalled for a single period of three hours or more; or
- (c) the nature of the work undertaken during the on-call period involved special hazards or a heavy physical, mental or emotional strain, such as providing assistance to a critically ill member of the employer's household,

he or she is entitled to a break of at least 18 hours before the commencement of the next period of work.

## **21. Compensation for on-call work**

### **21.1 Availability allowance**

21.1.1 Domestic workers who perform external on-call duty must be compensated in the form of an allowance of at least 25 per cent of the ordinary wage per hour, irrespective of the rate or incidence of call-out.

### **21.2 Call-out premium**

21.2.1 Workers recalled to work must be compensated in the form of either:

- (a) remuneration at the ordinary rate plus at least 50 per cent for each hour during which the worker is on call-out, and at least 100 per cent for call-out duty performed during the period from midnight to 06:00 and on the weekly rest day and public holidays; the call-

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out premium is in lieu of any overtime, night work, weekly rest and public holiday premia to which the worker would normally be entitled;

- (b) where provided for in a collective agreement concluded by representative organizations of domestic workers and organizations of employers and agreed between the individual domestic worker and his or her employer, a period of compensatory rest of at least 90 minutes for each hour of call-out duty worked (or part thereof); this compensatory rest period is to be taken as soon as possible after the call-out period and in any event within one month and at a time acceptable to both the employer and domestic worker.

21.2.2 The domestic worker who performs call-out duty is also entitled to compensation for travel time at the relevant premium rate. An alternative method of remuneration for travel time may be determined through negotiations between representative organizations of domestic workers and organizations of employers.

21.2.3 Where travel to the place of work will involve danger to the domestic worker or considerable disruption, the employer must ensure that a safe mode of transport is available, such as through the provision of a travel allowance.

## **Chapter 2: Working time adjustments**

22.1 Where the employer would like to make significant adjustments to a domestic worker's duration or schedule of hours, the domestic worker should be informed of the proposed changes and options discussed for implementation of the change. These changes should take into account the preferences of the domestic worker.

22.2 Domestic workers are entitled to request adjustments in the duration or scheduling of their working hours, which must be granted by the employer unless they would conflict with an essential need for the domestic worker's services.

The procedure for making a working time adjustment request will be set out in a national-level collective agreement concluded by the representatives of domestic workers and organizations of employers or, where this is not possible, in a law or regulations. This instrument will set out details of the scheme, which will include requirements that:

- (a) the employer provide a written response to such a request, including reasons for refusing it where relevant;
- (b) the domestic worker be protected from discrimination in response to their request;
- (c) the scheme will ensure that requests by a domestic worker for a change in normal working hours in order to care for a young child or disabled or sick family member (R 182, Paragraph 20) will be granted in all but exceptional circumstances;
- (d) the domestic worker and the employer have access to the dispute resolution or mediation procedures applicable to other employment disputes when no agreement can be reached.

## **Chapter 3: Emergency family leave**

23.1 Domestic workers are entitled to at least five days' paid leave per year to attend to family emergencies (SD7, Clause 21).

23.2 Where domestic workers who are migrants need to return to their home country as a result of a family emergency, they are entitled to at least eight days of emergency family leave.

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## Part D: Monitoring standards

### 24. Record-keeping

24.1. Each week, the domestic worker shall record the hours he or she has actually worked in a Weekly Hours Record (WHR) and have it signed by the employer.

24.2. The domestic worker must be given the opportunity to view the WHR each week, whether separately or as part of a wage slip, in either a hardcopy or in electronic form.

24.3. The WHR must contain as a minimum the following information:

- (a) the name and address of the employee;
- (b) the social security number or equivalent of the employee;
- (c) a brief statement of the domestic worker's duties;
- (d) the total number of normal hours performed by the domestic worker on each working day and the week as a whole;
- (e) where an hours-averaging scheme is in operation, the week of the reference period;
- (f) hours worked on weekly rest days and public holidays and the additional payments made;
- (g) any hours of overtime worked, the days on which they were performed and the overtime payments made;
- (h) any days or hours of leave or public holidays and payments made in respect of the leave or holiday periods;
- (i) any hours of night work and the additional payments made;
- (j) any periods of on-call work, including both on-call and call-out periods, and the payments made in respect of this work.

24.4 A copy of all WHRs, including the current record, must be provided to the domestic worker and, where it exists, his or her representative organisation at the local level.

24.5 Records must be retained by the employer for a two-year period and made available to the labour inspectorate and the domestic worker's representative organization on request. It is an offence to fail to keep WTRs or to fail to provide them when requested.

### 25. Implementation

25.1 As part of broader efforts to ensure the application of the law, the government will consult regularly with representative organizations of domestic workers and organizations of employers at the national level to devise and review methods of:

- (a) monitoring the working hours of domestic workers; and
- (b) implementing and enforcing this standard;

with a view to adopting and refining strategies that contribute to the goal of achieving decent work for domestic workers.

25.2 The influence of the statutory standards shall be evaluated periodically, and at least once in each five-year period, and tailored reforms introduced as needed.

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25.3 Representative organizations of domestic workers and organizations of employers at all levels will design and implement programmes towards educating and providing assistance to domestic workers and employers in complying with these standards.